No. 15302

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON C. CHARLES,

Appellant,

vs.

WILLIAM N. BOWIE, JR., as Trustee in Bankruptcy of American Aeronautics Corporation, Bankrupt,

Appellee.

APPELLEE'S OPENING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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APPELLEE'S OPENING BRIEF.

Statement of Facts.

Appellant Milton C. Charles filed his Petition for an Order to Show Cause in which he alleged that the now bankrupt American Aeronautics Corporation made an assignment in writing to him of the sum of $4,000.00 from a Federal Income Tax Refund due from the Director of Internal Revenue [Tr. p. 3]. Appellant's attorney in his opening statement stated that he was proceeding upon a written assignment [Tr. p. 19]. The said writing was introduced in evidence by appellant who relies upon the same herein [Ex. 1; Tr. p. 21].

The appellant, a certified public accountant, [Tr. p. 23] was employed by the said bankrupt in July of 1954. His said employment was for two purposes: first, to straighten up the books of the bankrupt; second, to perform certain audits and other general work in connection with anticipated litigation that the bankrupt was going to enter into [Tr. pp. 20, 24]. Not until or on about February 15, 1955, was the written assignment, which is the basis of the case at bar, executed and delivered [Tr. pp. 20, 21, 25]. It was expressly for compensating for work to be performed in connection with a claim for an income tax refund [Tr. p. 22].

The said American Aeronautics Corporation was adjudicated a bankrupt on September 1, 1955, and thereafter the appellee herein duly took office as its Trustee in Bankruptcy.

The terms of said written assignment are prospective rather than retroactive in nature. They state, in part, that the bankrupt had no moneys with which to pay appellant's fees *"to do* the necessary accounting and prepare and file the return in order to obtain" a substantial income tax refund (italics supplied). The document further states that the work was *"to be* performed by you." (italics supplied). [Tr. p. 22]. The writing did not assign any specific amount of money to the appellant for the said services. It did not state that his payment should be "in the amount of" $4,000.00. On the contrary, it provided that "you may consider this an assignment of what-

ever refund we receive as a result of your services to the *extent* of $4,000.00 for such services" (italics supplied) [Tr. p. 22].

Appellant testified that he spent two or three days on the preparation of the claim for refund and that "the labor for preparing the refund" was performed in February of 1955 [Tr. p. 28]. The appellant testified that a reasonable charge for his work was $100.00 per day [Tr. p. 27].

The Referee, after considering the written assignment and the oral evidence adduced, held that the sum of $300.00 had been assigned to appellant from the fund derived from the income tax refund [Tr. p. 32; pp. 5-8]. The balance of appellant's claim was, of course, subject to the filing of a claim as a general creditor in the bankruptcy proceeding [Tr. p. 33]. The court found that there were sufficient funds on hand to pay the sum of $300.00 aforementioned [Tr. p. 7].

ARGUMENT.

I.

The Parol Evidence Rule Applies to the Written Assignment Herein, and Extrinsic Evidence Should Not Be Permitted to Contradict the Terms of the Written Agreement.

The parties deliberately put their engagement in writing in such terms as import a legal obligation. The said writing, to wit, Exhibit 1, imports on its face to be a complete expression of the whole agreement. Parol evidence cannot be suffered to add other terms to the agreement or to vary or contradict the terms thereof.

Lande v. Southern California Freight Lines, 85 Cal. App. 2d 416, 421;

Hale v. Bohannon, 38 Cal. 2d 458, 465;

Harrison v. McCormick, 89 Cal. 327, 330;

Civ. Code, Sec. 1625.

The writing is to be construed as containing all of the terms of the contract, for the writing itself is the contract.

Estate of Gaines, 15 Cal. 2d 255, 265;

Nourse v. Kovacevich, 42 Cal. App. 2d 769;

18 *Cal. Jur.* 2d 737.

Accordingly, where a written agreement, as in the case at bar, clearly sets forth that it is an arrangement for payment for services in connection with a "claim for refund," parol evidence should not be permitted to change said agreement into a radically different and contradictory thing, to wit, into an assignment for the purpose

of compensating for work done in straightening up the bankrupt's books or for performing audits and other general work in connection with anticipated litigation that the corporation was going to enter into.

II.

The Intent of the Parties Was Clearly Expressed in the Written Assignment.

The contract in the case at bar says in plain language forty (40) "hours." That word should not be interpreted to mean forty (40) "days" as appellant contends.

The contract in the case at bar is expressly prospective in its terms; it uses future indications such as the phrase "to be performed." Those words should not be interpreted to mean "already performed" as appellant in effect contends.

The contract in the case at bar expressly limits funds assigned to an "extent." That word should not be interpreted to mean "amount" as appellant in effect contends.

> "It is a fundamental rule of construction of contracts that the intention of parties must be ascertained, if possible, from the language of the instruments and when so ascertained should be given effect."
>
> *French v. French,* 70 Cal. App. 2d 755, 757;
>
> *Sun-Maid Raisin Growers v. Jones,* 96 Cal. App. 650, 653;
>
> *Pendleton v. Ferguson,* 15 Cal. 2d 319, 323.

III.

Appellant Was Permitted Wide Latitude in the Presentation of All of the Evidence He Wished; the Referee Made His Findings and Order With All of This Evidence Before Him and there Was Ample Evidence to Support the Same.

The Referee did not exclude any evidence which appellant offered. Even assuming that there was ambiguity in the terms of said written assignment, appellant had wide latitude in introducing all the evidence he wished at the hearing. The Referee had before him for consideration both the written document upon which appellant's petition was based and, in addition, the testimony of witnesses whose credibility and demeanor he had full opportunity of assessing and judging.

The written agreement itself was the first and highest evidence as to the intent of the parties in executing it.

Davis v. Basalt Rock Co., 114 Cal. App. 2d 300, 303.

The court should not disturb the findings of the Referee unless they are manifestly unsupported by the evidence.

Matter of Musgrave, 48 A. B. R. (N. S.) 683, 27 Fed. Supp. 341.

The court shall accept the findings of fact of a referee "unless clearly erroneous."

General Order in Bankruptcy No. 47.

The court should not disturb the findings of the Referee upon disputed issues of facts

> "unless there is most cogent evidence of mistake and miscarriage of justice. . . . Realizing that the Referee, having heard the witnesses in person, is in a much better position than the court to determine the credibility of witnesses and the truth as to disputed facts, I am unable to say that the action of the Referee in this respect is clearly erroneous, and hence the petition for review is denied. . . ."

Matter of Roark, 48 A. B. R. (N. S.) 428, 28 Fed. Supp. 515, 518.

IV.

The Written Assignment in Controversy Cannot Be Interpreted so as to Reform It.

Appellant expressly pleaded a written assignment [Tr. p. 3]. The case was tried on the basis of the said alleged assignment in writing [Tr. p. 19]. The alleged assignment was introduced into evidence [Tr. p. 22; Ex. 1].

If there is a mistake in a contract, it must be pleaded and remedied through a complaint for reformation.

Harding v. Robinson, 175 Cal. 534, 541, 542.

A complaint on an express contract should show the agreement and compliance therewith.

Foley-Carter Insurance Co., Inc. v. Commonwealth Life Insurance Co., 128 F. 2d 718;

Fed. Rules of Civ. Proc., Rule 8(a).

V.

There Is Ample Evidence as to the Amount of Work Performed by Appellant After the Delivery of the Assignment and Pursuant Thereto.

The assignment itself was executed and delivered on or about the date it bears, to wit, February 15, 1955 [Tr. p. 25]. The assignment by its terms limits the assigned funds to work done in connection with the claim for refund [Ex. 1; Tr. p. 22]. This labor was performed in the month of February, 1955 and required two or three days [Tr. p. 28].

Respectfully submitted,

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Attorney for Appellee.